

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 -----x
4 *In the Matter of Search Warrants*
5 Executed on April 9, 2018

6 -----x
7 MICHAEL D. COHEN,

8 Plaintiff,

9 v.

10 18 Mag. 3161

11 UNITED STATES OF AMERICA,

12 Defendant.

13 -----x
14 New York, N.Y.
15 April 26, 2018
16 12:00 p.m.

17 Before:

18 HON. KIMBA M. WOOD,

19 District Judge

20 APPEARANCES

21 MCDERMOTT WILL & EMERY LLP
22 Attorneys for Plaintiff
23 BY: TODD HARRISON
24 STEPHEN RYAN

25 ROBERT S. KHUZAMI
26 Acting United States Attorney for
27 the Southern District of New York
28 THOMAS A. MCKAY
29 RACHEL A. MAIMIN
30 NICOLAS ROOS
31 ANDREA GRISWOLD
32 Assistant United States Attorneys

1 Also Present:

2
3 SPEARS & IMES LLP
4 Attorneys for Intervenor
5 Donald J. Trump, President
6 BY: JOANNA C. HENDON
7 REED M. KEEFE
8 CHRISTOPHER W. DYSARD

9
10 LAW OFFICES OF ALAN S. FUTERFAS
11 Attorneys for The Trump Organization
12 BY: ELLEN RESNICK
13 RICHARD BRUECKNER

14
15 JOHN BROWNING
16 Attorney for Third Parties ABC, Inc. and CNN, Inc.

17
18 MICHAEL AVANATTI
19 Attorney for Interested Party
20 Stephanie Clifford a/k/a "Stormy Daniels"

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1 (Case called)

2 THE COURT: Good morning.

3 I'd like to begin by asking the government for an oral
4 update.

5 MR. MCKAY: Yes, your Honor, as we said in our letter
6 of this morning, the headline is that, with a few
7 qualifications that I will describe now, we think we are on
8 schedule as we described in our earlier letter to the Court.
9 We made our first production yesterday, which was I believe two
10 days ahead of what we anticipated as the first date of rolling
11 production. We expect to make another substantial production
12 tomorrow.

13 With respect to the three categories of documents or
14 materials, the first is hard category documents, the second is
15 hard drives or electronic storage devices, and the third is
16 cell phones or iPads.

17 With respect to hardcopy documents, we have been
18 scanning those documents so they can be on an online system. I
19 think there were about eight boxes. We have seven done. One
20 hopefully should be completed today. Those documents will then
21 be loaded both into Relativity, which is a third-party vendor
22 that the government is planning to use and I believe at least
23 some intervenor counsel are planning to use.

24 We will also be giving those in a load file to counsel
25 for Mr. Cohen, who I understand may be using a different data-

1 base, which may cut down on some of the lag time. As I
2 mentioned, there is a little lag between when we give the
3 documents to our third-party vendor and when they get them up
4 into our ability to view it. It sounds, from what Mr. Cohen's
5 counsel have said, their vendor might be a little bit quicker
6 in that request.

7 THE COURT: What is a little bit quicker?

8 MR. MCKAY: I will defer to them on that.

9 THE COURT: How quick? I'm wondering how quickly the
10 documents can be uploaded onto your system.

11 MR. HARRISON: Judge, I am not the most electronically
12 savvy, which is why I brought Ms. Louks.

13 THE COURT: Thank you.

14 MS. LOUKS: It would depend on the volume of data. We
15 have really fast transcript protocols, so we could, I think,
16 reasonably expect to get the data up in our system within 24 to
17 48 hours depending on the size of the files received.

18 THE COURT: That's all of the data?

19 MS. LOUKS: Depending upon when we receive it and,
20 again, the total volume of files.

21 MR. MCKAY: With respect to the hardcopy documents, it
22 is going to be not a large volume, gigabytes not terabytes,
23 such that their vendor or any vendor could process it. With
24 respect to the computer hard drives, that might be a slightly
25 larger volume. Still, as soon as we have that produced, it

1 sounds like they will be able to upload it pretty quickly.

2 With respect to the hardcopy documents, we are hopeful
3 we will have that load file ready for Mr. Cohen's counsel by
4 tomorrow such that they could be reviewing the hardcopy
5 documents tomorrow or this weekend or Monday.

6 The next category is the cell phones and iPads. Our
7 production yesterday that I mentioned earlier was the contents
8 of four phones and one iPad. With three exceptions I'll talk
9 about briefly, we think the remainder of the phones and iPads
10 seized, which number about a dozen, should be going out in
11 tomorrow's production to defense counsel. I'll note that these
12 are going straight onto the hard drives. These don't need to
13 be loaded into the electronic database because they come in a
14 sortable report.

15 The exceptions that I will mention are two BlackBerrys
16 were seized. BlackBerrys just take longer to extract. I'm
17 told it's about three weeks. So those will be a little bit
18 delayed.

19 Then there is one iPhone in particular which may take
20 a little bit longer to extract than the others, I'm told up to
21 104 days. We are working with defense counsel about a way that
22 we might be able to expedite that particular iPhone. Generally
23 speaking on the phones, we have already got some out and we
24 expect to get the vast majority out by tomorrow.

25 Lastly, there are computers and electronic storage

1 devices. Everything has been forensically processed at this
2 point. What the FBI is working on now is turning those
3 forensic images into the load files that can be placed into our
4 database or Mr. Cohen's database. That process is a little bit
5 slower and tougher to predict how long it is going to be.

6 Although I can't give you a specific guarantee about
7 when that is going to be done, I'm told that we can cautiously
8 estimate that that will be done by the end of next week such
9 that, again depending on how quickly Mr. Cohen's counsel gets
10 that uploaded into their database, they could be reviewing
11 things by the end of next week or certainly early in the
12 following week.

13 THE COURT: Thank you very much.

14 Do defense counsel wish to speak in response to the
15 government?

16 MR. RYAN: I wouldn't speak in response, your Honor.
17 I will just make the following representation. This morning at
18 7:58 a.m. we received back the first hard drive, which has 100
19 gigabits of data on it. We are in the process of uploading it.
20 In fact, I can tell you that we have a hundred gigabits of data
21 because we are already in that process.

22 Everything is working just as we represented to the
23 Court in our last visit. We actually looked at having an
24 outside vendor do this. We chose our own service because we
25 can make it work faster, candidly, and with confidence.

1 As we put in our papers, the first sorts that are
2 going to be done are to identify the fields of privileged
3 documents and then to hand off to The Trump Organization those
4 documents that may contain privileged information to the Trump
5 lawyer, to the president's lawyers, those things that may
6 contain that. Our own firm will be working on other privilege
7 issues.

8 I want to remind the Court there is an inbound to Mr.
9 Cohen set of privileges. For example, my law firm represented
10 him for almost a year before Mr. Mueller and the congressional
11 investigations. So there are all those privileged documents
12 that are inbound to him. I'll use my law firm as
13 representative of the four that were on page 2 of our
14 submission -- last week to you? It becomes harder to remember
15 which day is which. Then there is the outbound, which is Mr.
16 Cohen's work either for TO or the president or his other
17 clients.

18 So we are actually in a very good place and everything
19 is ready to roll. There will actually be three law firms
20 simultaneously working on the documents as soon as we can do
21 that sort. I'm hoping within three or four days they will be
22 fully equipped to have it up on their servers as well.

23 THE COURT: Would anyone else like to be heard on this
24 point? All right.

25 The letters that I received from counsel for Mr. Cohen

1 and the intervenors has convinced me that this process can go
2 quickly with a special master, assuming everyone works as hard
3 as you have represented you will work. As I've said before, I
4 view a taint team to be as fair as one done by a good special
5 master. I am agreeing with the government and counsel that a
6 special master makes sense at this point, notwithstanding that
7 I think we all know that the Southern District prosecutors have
8 integrity and decency and could do the job with utmost
9 integrity.

10 I will appoint a special master. If at any point it
11 turns out that the special master review process is going too
12 slowly, I'll revisit the question of the scope of the special
13 master's role. I would like the special master to have the
14 ability to be as effective as the taint team. That would be a
15 hard standard to match, I know, because the taint team is
16 already up to speed on what is being investigated.

17 As a first matter, the special master should have
18 access to all discovery materials as well as the search warrant
19 and the application for the search warrant. I believe that
20 counsel have identified a number of ways to go forward and have
21 correctly placed the question of privilege ahead of other
22 possible cuts through the documents.

23 It may well be that counsel will want to wait until
24 they have reviewed all of the documents on a certain matter
25 before deciding which ones to assert privilege on. I am not

1 expecting you to go document by document and handing it up to
2 the special master. But once you have your set, you will want
3 to identify it to the special master. She herself would be
4 looking at the documents and considering what falls within the
5 privilege and does not so that this can move along more
6 swiftly. She will certainly hear from those who have produced
7 documents and at some point from the government.

8 There is no need to prepare a privilege log. I think
9 that has come to be viewed as very wasteful of time because
10 they seldom contain enough information to be useful. I will
11 leave it to counsel and the special master to decide how to
12 inform the taint team of enough information so that they can
13 argue lack of or exceptions to privilege and work product.

14 I have considered the proposals of counsel for a
15 special master. I have also done some checking on my own. In
16 my view, the person best qualified to be special master in this
17 case is Barbara Jones, who is with the Bracewell firm. I have
18 spoken with her about how much of her time she could devote to
19 this. She has committed 90 percent of her time to it and
20 perhaps more if needed. She has also committed a similar but
21 not quite as much amount of time of one of the senior partners
22 at her firm.

23 I should tell you a few things about Barbara Jones in
24 case you don't know them. She spent nearly 17 years on the
25 bench of this court. She dealt with many cases, many important

1 cases, and issues of privilege over those years. She also was
2 in the U.S. Attorney's office and in the district attorney's
3 office when she was younger. She has been in private practice
4 for about five years. So she has all of the different points
5 of view you would want to bring to these documents.

6 She is available early next week to meet with counsel.
7 I have copies of her résumé; my law clerk has them. Also, of
8 course, her law firm has a website. You will have her
9 telephone number. You will want to talk with the government to
10 decide whether you want to meet with her together or
11 separately. You can certainly do either.

12 I should note that I reserve the right to speak at any
13 time to the special master. I'll be checking in with her at
14 least once a week to see how quickly the review is going.
15 After about four weeks, I'll be concerned if it's not on
16 schedule. On schedule means that you are giving the special
17 master's team enough to keep it occupied full time.

18 I would like to say a word about contract lawyers and
19 associates. I think the general learning that we all have
20 gotten from these cases is that everything moves more
21 efficiently the smaller the team you have and the more senior
22 the team you have. To have contract lawyers looking at a
23 document is probably not at all efficient. I'm sure you will
24 each want to do what is most efficient.

25 Did you wish to be heard?

1 MR. RYAN: We are not intending to use contract
2 lawyers. It will only be full-time McDermott lawyers. I can
3 assure you that I am picking the smart ones to do this.

4 THE COURT: Oh, I'm going to have to seal that part of
5 the transcript from your law firm. Okay: smart ones. One
6 counsel whose name I won't mention mentioned contract lawyers,
7 and I said that for that person's benefit.

8 The special master will be reviewing documents for
9 both responsiveness and privilege.

10 With respect to paying for the special master, I won't
11 make any decision yet. I'll ask you to discuss this among
12 yourselves and discuss with the special master what she
13 proposes to be paid. It is my impression that she does not
14 propose to be paid any more than the magistrate judges on the
15 list given by the government, which I assume is a lower rate
16 than most lawyers in private practice.

17 Are there any questions? Yes?

18 MS. HENDON: Thank you, your Honor.

19 THE COURT: Yes, Ms. Hendon.

20 MS. HENDON: I just want to make sure I understand
21 your Honor's ruling. Is it your Honor's decision that the
22 seized materials will flow from the government to Mr. Cohen's
23 counsel in the first instance; Mr. Cohen's counsel, in
24 consultation with privilege holders, will make cuts as to
25 privilege holders' documents; those buckets of documents

1 assigned to each privilege holder will then move to counsel for
2 that privilege holder?

3 THE COURT: I have not decided that for sure because
4 that was simply proposed by Mr. Cohen's counsel. It appeared
5 to be accepted by the intervenors, The Trump Organization, and
6 the lawyer for President Trump, but I'm not sure.

7 MS. HENDON: I can represent on behalf of Ms. Resnick
8 for The Trump Organization, who is looking at me and nodding,
9 and on behalf of my client that what I have just described is
10 acceptable. May I continue with what I understand your Honor's
11 process to be?

12 THE COURT: Certainly.

13 MR. MCKAY: Your Honor, if you prefer, I would like to
14 be heard on that particular process point. I am happy to wait
15 until Ms. Hendon has raised all the process points or respond
16 to that specific point, whichever the Court prefers.

17 THE COURT: Ms. Hendon, do you want to be heard first?

18 MS. HENDON: I would like to lay out what my under-
19 standing is. Then your Honor can correct me if it's wrong and
20 any of the other lawyers in the well may have their own
21 questions or comments.

22 Once the privilege holders have their set of documents
23 from Mr. Cohen's counsel, we will then review them and make
24 privilege designations. While what I just described is taking
25 place, a set of seized materials, as your Honor put it,

1 discovery materials, the search warrant, and other items will
2 go to the special master. She and her team will review that
3 material as they wish, however they choose to get going. The
4 idea would be they are looking for and making privilege calls
5 with input from the privilege holders' lawyers.

6 Simultaneously, the privilege holders are reviewing
7 this material and the special master and her team are reviewing
8 the material. Am I right so far?

9 THE COURT: That's right.

10 MS. HENDON: Thank you, your Honor. Next, the taint
11 team of the United States Attorney's office, it is my under-
12 standing that they would not be performing a simultaneous
13 review of the seized materials. Is that correct?

14 THE COURT: That's my understanding.

15 MS. HENDON: Thank you, your Honor. Finally, once the
16 intervenors have identified pieces of data or pieces of paper
17 over which we would claim privilege on behalf of our respective
18 clients, we are not going to spend time making privilege logs
19 for Judge Jones. We are going to turn over or somehow, in
20 agreement with her, designate exactly the set of materials that
21 we respectively would claim privilege over.

22 THE COURT: Yes. Did the government associate a
23 particular number with each page or each device?

24 MR. MCKAY: Yes, there should be control numbers on
25 the documents.

1 THE COURT: So you wouldn't have to send her
2 documents. You could send her the numbers.

3 MS. HENDON: That's very helpful. I understand your
4 Honor's ruling.

5 I don't think your Honor has spoken to the manner in
6 which disputes would be raised and challenges would be made. I
7 am not asking your Honor to do that because it seems to me it
8 may be your Honor's intention that the intervenors, the
9 government, and the special master work that out. But I might
10 be wrong about that.

11 THE COURT: If you work everything out, you won't need
12 to talk to me.

13 MS. HENDON: Thank you, your Honor. Thank you, Mr.
14 McKay.

15 THE COURT: I probably should deal with a housekeeping
16 matter first. There is a motion to intervene.

17 MR. AVENATTI: Yes, your Honor.

18 THE COURT: I grant that motion.

19 MR. MCKAY: Judge, can we be heard on that?

20 THE COURT: Yes.

21 MR. MCKAY: We saw the motion before coming over to
22 court this morning. We read it briefly. We ask the Court
23 before you decide it that we have the opportunity to put in
24 written submissions.

25 I think it is important to keep in mind that this is a

1 litigation related specifically to the searches that were
2 conducted of Mr. Cohen's premises and devices. Mr. Cohen and
3 Ms. Clifford were never in an attorney-client privilege
4 relationship; there is no allegation that there was. The
5 suggestion that Ms. Clifford's counsel may have shared
6 something with Mr. Cohen such that Mr. Cohen has privileged
7 materials is something that we have really no evidence of.

8 THE COURT: Would they be privileged?

9 MR. MCKAY: I think if they were shared against Ms.
10 Clifford's wishes, they might be.

11 THE COURT: Might be privileged? It's her privilege.

12 MR. MCKAY: If a privileged document between Ms.
13 Clifford and Mr. Davidson were shared with Mr. Cohen against --

14 THE COURT: It would lose its privilege.

15 MR. MCKAY: If it were against Ms. Clifford's wishes
16 without her authority, it might be.

17 THE COURT: I see.

18 MR. MCKAY: It is not important to get to the bottom
19 of that today because at this point we have no concrete
20 information that that in fact happened. So I'm not asking the
21 Court to deny the motion today. I'm just asking that we have
22 the opportunity to review Mr. Avenatti's brief and submit any
23 objections.

24 Based on our understanding, this litigation is about
25 these discrete searches of Mr. Cohen's property and not any

1 matter in any way touching on matters relating to Michael Cohen
2 or Ms. Clifford. I'm not sure that this motion is properly
3 made in this case, so we may object. We would like the
4 opportunity to brief that, your Honor.

5 THE COURT: I will give you that opportunity. My
6 concern would be that if, for example, any of Ms. Clifford's
7 documents were given to Mr. Cohen without her having agreed to
8 it -- is that, Mr. Avenatti, your main concern or is it
9 something else?

10 MR. AVENATTI: Your Honor, we have a number of
11 concerns, but that is our primary concern, you are correct.
12 I'm happy to illuminate the other concerns that we have.

13 THE COURT: Thank you.

14 MR. AVENATTI: Our concerns, your Honor, are as
15 follows. We have substantial reason to believe based on my
16 communications directly with Mr. Davidson that there was an
17 improper or a series of improper communications of attorney-
18 client privileged information belonging to my client to Mr.
19 Cohen both during the negotiation period of this NDA as well as
20 thereafter. That is number one. That is a very serious issue
21 for us, as you might imagine.

22 Secondly, we have reason to believe that Mr. Davidson
23 continued to communicate with Mr. Cohen about my client and
24 about the NDA as recently as days prior to the FBI raids.
25 Those communications had continued without my client's consent.

1 Of course, those communications, whether they be by email, text
2 messages, or otherwise, would technically belong to my client
3 because it would be part of her attorney-client file. That is
4 a second concern that we have.

5 The third concern that we have, your Honor, is that
6 many of these documents and communications may fall under the
7 settlement privilege that would have existed relating to the
8 negotiation of the NDA in the settlement of the disputes or
9 potential settlement of the disputes.

10 Those are our three primary issues, your Honor. We
11 filed a motion for intervention. The Court dispensed with the
12 other motions for intervention fairly quickly. We are not
13 looking for any adjudication by your Honor, by this Court, as
14 to any of those issues. We just effectively, your Honor, want
15 a seat at the table.

16 THE COURT: I have difficulty understanding any flaw
17 in Mr. Avenatti's position. He is not asking for me to state
18 that any of what he surmises or believes is true. He just
19 wants to be able to have a seat at the table to look at
20 anything relating to his client.

21 MR. MCKAY: Your Honor, we are simply asking for the
22 opportunity to consider his motion and file a responsive brief
23 if we think it is appropriate. Unlike in the context of the
24 other intervenors, where there was a really strong reason to
25 think that Mr. Cohen in fact has a privileged relationship with

1 this person, we are not so sure that that is the case with
2 respect to Ms. Clifford.

3 We are happy to speak to Mr. Avenatti to consider the
4 law in this matter. I just would like the opportunity to
5 respond and not get sidetracked over the issue that we are
6 focused on today, which is the procedures for the special
7 master.

8 THE COURT: All right. I will hold off ruling on Mr.
9 Avenatti's motion to intervene on the condition that the
10 government allow Mr. Avenatti to ask the government questions
11 and attempt in good faith to resolve whatever needs to be
12 resolved.

13 MR. AVENATTI: Thank you, your Honor.

14 THE COURT: I will hear a motion for intervention
15 later on.

16 MR. AVENATTI: We are not maintaining that at any time
17 my client had an attorney-client relationship with Mr. Cohen,
18 just so we are clear. Thank you.

19 THE COURT: Thank you.

20 MR. MCKAY: If I may go back to procedures, your
21 Honor?

22 THE COURT: Yes.

23 MR. MCKAY: To respond to Ms. Hendon's point, in one
24 respect we are on the same or close to on the same page, which
25 is who makes the initial cut of what is potentially privileged.

1 I understood the Court to be agreeing that we produce the
2 materials both to Mr. Cohen's counsel as we already are and
3 also to the special master so there can be work done in
4 parallel. We can discuss with the special master next week the
5 specific procedure that she intends to follow.

6 Our view is that it should not be the case that we
7 have to wait for Mr. Cohen to parcel out some materials to each
8 of the intervenors, the intervenors then to make their
9 privilege determinations, and all the while the special master
10 is doing nothing but waiting for a list of documents from
11 counsel. I think the special master should, if she is so
12 inclined, follow a procedure like what we proposed in our
13 compromise position this morning.

14 THE COURT: That is precisely what I discussed with
15 her.

16 MR. MCKAY: Excellent.

17 THE COURT: She will be working all the time looking
18 at everything so that she will be best positioned to make the
19 important decisions that need to be made here.

20 MR. MCKAY: Your Honor, perhaps this is something that
21 you intend to defer to the special master to decide. Our
22 request would be that whatever the particular process be,
23 counsel for Mr. Cohen and the intervenors be given their
24 specific time frame in which to make any identification of
25 privileged materials. I don't know whether the Court intends

1 to set that or defer to the special master on that point.

2 THE COURT: Initially, I would defer to the special
3 master. That has been very much on my mind. Perhaps each of
4 you could tell me what you would like to have done first.

5 MR. MCKAY: Our proposal, and I understand you are not
6 going with the specific proposal that we had put forth, was
7 that the special master that we had described would use a
8 technology assisted review platform which could get an initial
9 cut of potentially privileged documents within two weeks.

10 THE COURT: Right.

11 MR. MCKAY: Our proposal was going to be that during
12 those two weeks counsel for Mr. Cohen and the intervenors be
13 working in parallel to make their own determination and that
14 they be given some discrete amount of time after the special
15 master has made her first cut, perhaps two weeks more, in order
16 to add any additional identification.

17 THE COURT: Yes. I wanted to note that Judge Jones
18 has used the TAR process and they have other processes they use
19 and special rooms, special machines devoted to a particular
20 case. I think she will be technologically well suited to the
21 job.

22 MR. MCKAY: That addresses that concern, your Honor.

23 The next one was I understood the Court to say that
24 you do not believe a privilege log is necessary. We definitely
25 agree with that.

1 I also understood you to say that you were deferring
2 to the special master exactly how much information would be
3 provided to the filter team in order for them to lodge any
4 objections to designations of privilege. To make sure our
5 position is clear, whether the Court is deciding this or not,
6 we think it is very important that the filter team be given
7 access to the actual document that is designated as potentially
8 privileged so that a filter team member can make an informed
9 judgment about whether to object to the designation as
10 privileged or not. That is not only to protect the law
11 enforcement interests at stake, but it is also in the interests
12 of efficiency.

13 Take, for example, a privilege log with a list of
14 documents. If the filter team or the government generally is
15 in the dark, doesn't have enough information about what that
16 document is, it is going to be very difficult for the govern-
17 ment to do anything other than make overbroad objections to
18 preserve their rights. If, by contrast, the filter team can
19 see the document and say, yes, that is obviously privileged, no
20 need to dispute that, I think the special master is likely to
21 be adjudicating a far narrower set of disputes over privilege.

22 Because of the Court's comments about the integrity of
23 the Southern District and the filter team and because of the
24 case law in this area, we think that sharing that subset of
25 potentially privileged documents with the filter team for the

1 sole purpose of lodging any objections adequately and fully
2 respects privilege while still balancing countervailing
3 interests. I just wanted to make sure we were heard on that
4 point.

5 THE COURT: All right. I would like to hear all
6 counsel on that point.

7 MS. HENDON: Your Honor --

8 MR. RYAN: I think it is my turn. If I may. Is that
9 all right with your Honor?

10 THE COURT: I was waiting to see who was going to win
11 this.

12 MS. HENDON: As a privilege holder, I would like to
13 begin.

14 THE COURT: Please go ahead.

15 MS. HENDON: As the privilege holder, I appreciate
16 your courtesy, Mr. Ryan.

17 On the first point concerning the simultaneous review
18 of the materials, which I think we all fully understand, I want
19 to make sure everyone in the well and that your Honor is clear
20 in understanding that there will be some lag time between when
21 the special master and her team are able to access the searched
22 materials and begin, whether they use TAR or another protocol,
23 making privilege determinations and a time in which the
24 intervenors can.

25 THE COURT: I'm not clear on what you are saying.

1 MS. HENDON: For a very simple reason. We are not
2 permitted and it wouldn't be proper for us, counsel for Mr.
3 Trump, to just start looking at the full panoply of seized
4 materials. Those materials pertain to people other than Mr.
5 Trump. We would never suggest we have access to it. It is
6 just a function of the procedure and the situation we are here
7 in that the intervenors and the privilege holders do have to
8 wait to get the material from Mr. Cohen's team.

9 I don't anticipate any issue with that or any concern
10 about that, but I hear in the government's written proposal
11 they made to your Honor and in Mr. McKay's remarks a notion
12 that the special master, in effect, is going to make the
13 initial determinations and we will be given, as privilege
14 holders, some discrete amount of time thereafter to get up to
15 speed. I just think there is a troubling ring to that.

16 We have heard many times in the court --

17 THE COURT: I have gotten a note that you need to use
18 the microphone.

19 MS. HENDON: Thank you. There is a troubling ring to
20 that, your Honor. We are bound by the fact that we are just
21 not able to jump into the material the way the special master
22 can.

23 THE COURT: Let me ask Mr. Cohen's lawyers, anyone who
24 wishes to speak to this, how quickly do you think you can
25 identify documents that would be privileged for President

1 Trump?

2 MS. HENDON: It is actually not privileged documents,
3 your Honor. It would be Mr. Trump's, if you will,
4 representation files which we get and then we then review for
5 privilege.

6 THE COURT: I see. With that amendment.

7 MR. RYAN: First of all, it's been a little bit since
8 I have been able to get up. I wanted to say that I think the
9 choice of Barbara Jones as special master is a wonderful
10 choice, a fine choice, and we embrace that. We embrace the
11 Court's order.

12 What I do not embrace is the chiseling that's going on
13 now in a sense to try and change the outcome of the Court's
14 order, which I thought was very clear. The issue that is the
15 core issue here is the wholesale transfer of privileged docu-
16 ments to the taint team. I believe that the special master
17 should be left with the authority to determine when and if the
18 taint team is allowed to see the privileged documents.

19 But there should be no presumption, absolutely no
20 presumption, that a hundred percent of the documents that we
21 believe are privileged should be given to the taint team for
22 their review. So criminal investigators employed by the
23 Department of Justice and assistant U.S. attorneys employed by
24 the Department of Justice get it, because that is inconsistent
25 with the 400-year-old privilege. It is inconsistent with it in

1 that sense.

2 I think the master can make that decision. If she
3 makes the decision that 100 percent are going to be given over,
4 I might ask to be heard by you again. If she selects whatever
5 percentage she thinks they ought to be able to see, I think
6 that is her call. I think this is an issue best left to her to
7 at least in the first instance hear from us to gauge the way
8 that we are going about this. Let me stop at that point.

9 There is one other issue I want to talk about.

10 We are standing here today, I think I was last here on
11 April 16th, and this morning I got the first drive back. I
12 have the first data. I ask that the Court not put it on a
13 deadline today -- we have a hearing on the 24th here -- unless
14 Court is going to vacate that in light of the activity. We
15 have a deadline on us that I have always in my mind been
16 working to. The government has said that by the 13th they
17 think they will give us everything.

18 I don't know how hard this task is or how easy. I
19 actually think we know a great deal about how to get this
20 moving very quickly. And I know that I can't rise before you
21 and come back with a report that is inadequate. But today is
22 not the day to set that deadline, and the Court has us before
23 you in less than the ten business days I proposed when I was
24 last here in order to come back and report.

25 I think that is more than adequate. And the special

1 master will be getting direct communications from us and
2 speaking to the Court on a weekly basis. You can always bring
3 us back here earlier if you choose, but I think we have a
4 schedule that works and we have a process that the Court has
5 ordered that works. I think what we ought to do is leave that
6 process alone now and let it work.

7 THE COURT: I would like to ask Mr. McKay, how is what
8 you are now proposing different from giving all documents to
9 the taint team right away if you are going to see what counsel
10 view as the privileged documents eventually?

11 MR. MCKAY: Here we are not doing the initial
12 selection of what is privileged and not privileged. I think
13 the primary concern that was expressed with respect to the
14 taint team doing the initial review is that the taint team may
15 in fact take an underinclusive approach or not be fully
16 apprised of the facts necessary to make adequate privilege
17 calls. That concern is fully addressed by having the initial
18 review be made by the special master with the supplementation
19 of counsel for Mr. Cohen and the intervenors. They are able to
20 designate to the special master all of the things that they
21 claim to be privileged.

22 I think, however, it is very important to provide the
23 actual documents to the taint team for reasons we have already
24 discussed at length. They need to be informed to make their
25 objections. We have talked about concerns of overbreadth in

1 the designation of privileged materials.

2 Mr. Cohen's proposal, is not exactly what the Court is
3 adopting, but one of the things that struck me about Mr.
4 Cohen's proposal was that he would create a privilege log, and
5 the government would then object based on the privilege log.
6 The special master would only look at a document if the
7 government objected. That creates the poor incentives that I
8 described earlier for Mr. Cohen to overdesignate, for the
9 government to overobject, for us to litigate everything.

10 The filter team takes its job very seriously and can
11 be relied upon to make informed and reasonable objections if
12 they can see the documents. But if all they have is a
13 privilege log or a list of documents, it is very difficult for
14 us to evaluate whether or not there is a valid claim of
15 privilege here.

16 THE COURT: I fully accept what you say. If I were in
17 your shoes, I would definitely want to see --

18 MR. MCKAY: I don't want to send your the filter
19 team's --

20 THE COURT: No, no. If I were in someone else's
21 shoes, I would want to do that. It may come down to that, but
22 I would rather not decide that right now. I think it is
23 possible that Barbara Jones may come up with a compromise that
24 works for everyone. If she doesn't, I'd be glad to hear you
25 again on the taint team.

1 MR. MCKAY: Thank you, your Honor.

2 MS. HENDON: Thank you, your Honor. I just wanted to
3 correct something that Mr. McKay said that actually is
4 important for the proceedings. The president's objection to
5 the taint team was not primarily an objection on the basis that
6 they would not be fair. The president's objection was to any
7 third party, including the special master, seeing his
8 privileged material before he made designations.

9 Your Honor has made ruling with respect to the special
10 master that we have all discussed and heard today. From my
11 client's standpoint, we are already in a compromised position
12 just from the perspective of the privilege holder. The notion
13 that we will then give our privileged documents in this setting
14 over to the taint team would be something to which we would
15 take strong objection. I'm glad to hear your Honor not ruling
16 on that today.

17 THE COURT: Right, I'm not ruling on it.

18 MS. HENDON: Thank you.

19 THE COURT: Yes, Mr. McKay?

20 MR. MCKAY: Two quick points, your Honor. Both Ms.
21 Hendon and Mr. Ryan talked about deadlines and their concerns
22 about imposing specific deadlines today. To be clear, I am not
23 proposing that you set a specific deadline today. Our
24 discussions with Judge Jones about the procedures to be
25 followed out will inform any judgment about deadlines. Our

1 point was that we will ask Judge Jones and we hope you will
2 communicate to her that we think it is important to have
3 realistic and concrete deadlines, whatever those deadlines may
4 be. We can work those out with Judge Jones.

5 THE COURT: Good.

6 MR. MCKAY: The second point I want to make was with
7 respect to privileged documents versus nonprivileged and
8 responsiveness review, I understand the Court's ruling. To be
9 clear, I'm not trying to chisel. I'm just trying to clarify so
10 we are on the same page and the special master has her marching
11 orders.

12 The special master's review is for privilege. A
13 responsiveness review, which in any other case would be done by
14 the government's investigative team in the first instance, will
15 still be task of the government such that once the potentially
16 privileged materials are identified by the special master and
17 indicated by counsel for Mr. Cohen, the intervenor, the
18 nonprivileged materials, the materials over which there is no
19 claim of privilege by any interested party, will be promptly
20 released to the government so that the investigative team can
21 begin its work.

22 THE COURT: The responsive documents that are not
23 privileged should be released to the taint team, government, as
24 soon as that has been adjudicated. But I want to note one
25 thing that I know is very minor but might be on the mind of Mr.

1 Cohen or anyone whose files have been taken.

2 Suppose there is a medical file on his wife or child.
3 That clearly is, I think, nonresponsive. You would probably
4 agree that if Judge Jones described that to you, you would say
5 we don't need to see that.

6 MR. MCKAY: Your Honor, yes and no. Assume there were
7 a case in which there were no attorney-client privilege, there
8 was a seizure of electronic evidence. In every one of those
9 cases, just by the nature of the search of electronic evidence,
10 there will be nonresponsive material, often personal material.
11 That is exactly why rule 41 has the procedures it does for the
12 government to make a review of responsive material and to
13 extract or delete or get rid of the nonresponsive material.

14 There is no reason to expand the scope of the special
15 master's purview to that field. The concerns expressed in Mr.
16 Cohen's motion and the intervenor's motion have always been
17 uniquely focused on the attorney-client privilege. In this
18 case, like any other, we will do a very careful review of the
19 nonprivileged material for things that are responsive to the
20 warrant. Something like a medical file or particularly
21 personal things like that is clearly going to be nonresponsive,
22 and we are going to remove it from our selection of the
23 responsive material like we would in any other case.

24 THE COURT: Let's not decide this particular point
25 right now. If this issue comes up, you can raise it with the

1 special master. You can talk about what kind of documents are
2 there. If you really want to see a child's operation
3 document --

4 MR. MCKAY: Your Honor, I want to be very clear about
5 that. It is not that we really want to see a child's medical
6 file. It is that the procedure set forth in the rules, in the
7 search warrant, is for the government to do the responsiveness
8 review in the first instance. Having a special master get into
9 a responsiveness review is completely divorced from the relief
10 that counsel are seeking here.

11 Among other reasons, we talked about the ability to
12 make a responsiveness review. Of course, if there are --

13 THE COURT: I think I can shortcut this. What I have
14 in mind is if Judge Jones sees a document about a child's ankle
15 breaking, that is so clearly not responsive that you wouldn't
16 want it. She can tell you that she is keeping it and generally
17 what it is, but you wouldn't have the details. She won't be
18 making decisions that are closer to responsive than that.

19 MR. MCKAY: Your Honor, with that clarification, we
20 don't have a problem with that. My concern would just be
21 slippage from that, that Judge Jones's role would expand from
22 mere privilege review to responsiveness review as well.

23 So yes, we would agree that if there is something
24 particularly irrelevant and particularly sensitive and she sees
25 it, she can just note to the government, look, this isn't

1 privileged but you might mark this as such just because it is
2 so clearly nonresponsive.

3 But I strongly would like to push back on the
4 suggestion that she should be making any sort of responsiveness
5 review as a general matter because that is not the relief that
6 is necessitated by the concerns that the movants made and,
7 frankly, we don't think there is any precedent for that.

8 THE COURT: Perhaps the best way to word this is the
9 special master would have the authority to designate certain
10 documents as completely unresponsive and describe them to the
11 government in the presence of other counsel and decide whether
12 you think you need to see it. She won't be deciding whether a
13 particular phonecall among those who were operating during this
14 time, she won't be deciding whether those are responsive or
15 not.

16 MR. MCKAY: Understood. Thank you, your Honor.

17 THE COURT: Yes, Mr. Ryan?

18 MR. RYAN: I just want to be briefly heard. Mr. Cohen
19 has two children, one 18, one 22. I've met with members of the
20 family. We do believe that we ought to be able to do exactly
21 what I heard the Court say a second ago. For example, if there
22 is a file that has family photos, I ought to be able to tell
23 Judge Jones that this range is that, and she can confirm it and
24 then let the government know.

25 THE COURT: You would show her the documents?

1 MR. RYAN: I would give her the range, and she could
2 review it herself and ascertain that I am making a
3 representation that it is entirely correct.

4 I think what the government is saying is they got all
5 the stuff that is not in the warrant and they still want to
6 look at it. In other words --

7 THE COURT: I don't think so.

8 MR. RYAN: We will raise issues if they come up on
9 this issue. I hear the Court's order for today that I have at
10 least some bandwidth to protect the privacy of this family.
11 Thank you.

12 MR. McKAY: Your Honor, I'm sorry to belabor the
13 point. As Mr. Ryan is well aware, because I have expressed
14 this to his partner in previous conversations, we have no
15 intent to review the intensely personal things that may be
16 stored on a family member's phone or even on Mr. Cohen's phone.
17 But what he just suggested was now that he is going to
18 affirmatively be making quasi-responsiveness calls by
19 designating things to Judge Jones. We think that is mission
20 creep.

21 THE COURT: I wasn't quite clear on what he had in
22 mind, but I thought when I responded to him I made clear what
23 the situation will be, which is that all documents need to be
24 shown to Judge Jones. She will have a full set as soon as the
25 government gives her that set, but she won't be divulging

1 anything private and personal without the okay of other
2 counsel.

3 MR. MCKAY: Your Honor, the problem with that proposal
4 is that, let's say, for example, Judge Jones is using a
5 technology-assisted review platform or any platform that
6 requires a key word search. The types of key words that she
7 can and should be using are things that relate to the concern
8 about privilege: names of clients, names of attorneys, key
9 words designed to ferret out privilege. I don't think anyone
10 contemplates that in the many, many thousands or millions of
11 files that Judge Jones will have, she is going to go one by one
12 and find them all. There is going to be some sort of
13 mechanical sorting.

14 As long as the mechanical sorting that she is doing is
15 focused on the task for which she is being appointed, which is
16 to say a privilege review, if in the course of that she happens
17 upon a medical file that is not privileged but very clearly not
18 responsive, and she wants to say to Mr. Cohen's counsel and to
19 the government, look, document with Bates number 324 is really
20 clearly not responsive and personal, government, can I mark it
21 as such, that is fine with us.

22 What we would object to would be Judge Jones's purview
23 being expanded so that not only is she now trying to find
24 privileged documents but she is using key words that are
25 looking to find personal documents or nonresponsive documents.

1 I envision this more as sort of a plain view type
2 exception. If Judge Jones in the process sees something in her
3 review that is very clearly nonresponsive, it is one thing for
4 her to indicate that. But for her to have a separate task --

5 To be clear, the task of looking for nonresponsive
6 documents is very, very different from the task of looking for
7 privileged documents. It is going to require a whole new sort
8 of briefing in terms of the nature of the government's
9 investigation and what may or may not be responsive about Mr.
10 Cohen's personal relationships and what may be out of bounds.
11 It is going to require new key word searches, new search terms.
12 It is dramatically expanding the scope of what she is trying to
13 do. If you are asking defense counsel or Mr. Cohen's counsel
14 to make a log of identification of nonresponsive materials, you
15 are dramatically expanding the scope of what they want to do.

16 As long as what your Honor is proposing is sort of a
17 plain view type thing, if Judge Jones sees something very
18 clearly nonresponsive and wants to tell the parties as such,
19 that's fine. But I don't think it should be that she now has
20 two different tasks on her hands, privilege review and
21 responsiveness review.

22 THE COURT: Would anyone like to be heard further?

23 MR. RYAN: All I'd say, your Honor, is I may help
24 Judge Jones and give her a list of things that I think are
25 personal to the family when I find them. If she finds that

1 useful, she will tell me to continue it. If she doesn't find
2 it useful, I won't.

3 THE COURT: I assume that anything you say to the
4 special master can be communicated to me and to the government.

5 MR. RYAN: Yes. In fact, I don't have any problem
6 that they know the range that I'm saying contain personal
7 information about the family. The problem is really that the
8 special master in the first instance will have to gain
9 confidence that we are using that correctly because she will
10 have access to it.

11 MR. MCKAY: Your Honor, to the suggestion that he is
12 going to identify a range of personal material, what we have
13 set forth in our briefs is our view that given the extremely
14 limited number of clients that Mr. Cohen has and given the
15 recent representation by some of those clients about the
16 limited nature of Mr. Cohen's representation of them, the task
17 of reviewing for privilege may not be that voluminous. There
18 may not be that many privileged materials. We'll see. The
19 special master is going to find out.

20 But when you do an electronic search of a cell phone,
21 you're going to get an enormous amount of personal data. That
22 is a regrettable side effect of the way electronic searches
23 necessarily are carried out. It is usually the case that if we
24 get a cell phone, a very small fraction of that ends up being
25 responsive and a large amount of that is personal. That's why

1 there are procedures in place to separate out the nonresponsive
2 material.

3 If Mr. Cohen's counsel are distracted from the task at
4 hand, which is identifying privileged material, so they can
5 also create a log or range of things that they think are
6 improperly personal, you are dramatically delaying this
7 process, expanding the burden on the special master, and really
8 slowing this investigation down in a way that we think is not
9 only damaging to the law enforcement interests at stake but
10 also is not related to the interests at stake.

11 I say again if he were not an attorney, if there were
12 no reason to ever think there were attorney-client privileged
13 materials on this phone, we wouldn't be here talking about
14 special masters. The concern is one of attorney-client
15 privilege. If this were any other case and we had conducted an
16 electronic search, the government in the first instance would
17 do the responsiveness review in the sensitive manner that we do
18 to ensure that personal materials aren't seized.

19 But the task of identifying and deleting nonresponsive
20 material is far greater. It is a far more burdensome task for
21 Mr. Cohen's counsel and for the special master than the
22 privilege task is likely to be. So I think this is a very
23 serious expansion of the scope of what has been at stake here.

24 As long as it is just Judge Jones has the discretion
25 in her review to identify things that she sees, that's one

1 thing. But asking Mr. Cohen's counsel to identify personal
2 material in the beginning as an initial matter really will
3 dramatically slow down this process.

4 THE COURT: What I have in mind is that counsel will
5 all focus first on the privilege issue. That is what brought
6 us all here. Please do that.

7 MR. HARRISON: Yes, your Honor.

8 MR. RYAN: Yes, ma'am.

9 THE COURT: If anything in the process is worrisome to
10 the government, of course you will raise it with the special
11 master. If you don't get the answer you want there, you can
12 raise it with me.

13 Anything else?

14 MS. RESNICK: Good afternoon, your Honor. On behalf
15 of The Trump Organization, our position is we are not taking a
16 position. We have a seat at the table as a privilege holder.
17 We will devote the resources and the staffing that was
18 indicated in our letter of April 24th and Mr. Futerfas filed,
19 and we accept whatever process this Court adopts for the review
20 of the privileged documents.

21 THE COURT: Thank you. Mr. Avenatti.

22 MR. AVENATTI: Thank you, your Honor. One house-
23 keeping matter and one other issue I want to raise. If we
24 could have some deadlines associated with our motion to
25 intervene, deadline for an opposition or a position from the

1 government, we would like that decided sooner rather than
2 later.

3 THE COURT: Mr. McKay, do you have a proposed date for
4 a motion?

5 MR. AVENATTI: I'm hopeful we are going to work this
6 out, your Honor.

7 MR. HARRISON: Judge, I haven't had a chance to read
8 the papers yet from Mr. Avenatti. I don't know that we will
9 have a position or be involved at all. I would just reserve
10 the right to read them and file a response if necessary.

11 MR. MCKAY: As Mr. Avenatti said, we are happy to
12 speak with him and try to work this out. What we would ask for
13 is the opportunity to do so today and/or tomorrow and file any
14 opposition by the end of the day on Monday.

15 THE COURT: Certainly, that's fine.

16 MR. AVENATTI: The second issue I want to raise is I
17 listened to what Mr. McKay said earlier, and once I sat down I
18 wanted to raise this with the Court because I don't want there
19 to be any surprises. While technically we may be here today on
20 warrants that were executed on the residence, the hotel room,
21 and the office for Mr. Cohen, as our papers delineate, there
22 are additional issues relating to documents that were either
23 seized or voluntarily turned over by Mr. Davidson, my client's
24 former counsel.

25 We would like any issues relating to these documents,

1 whether they are privilege or otherwise, resolved in this court
2 because we think it is the appropriate forum to do so. In the
3 event we have to file another in re action, if the government
4 is going to actually put us through our paces to do that, we
5 will do that here in this court and have that deemed related
6 perhaps to this matter. But it would be our hope, your Honor,
7 that all of these issues could be dealt with in this court.

8 We have a significant concern, as you might imagine,
9 relating to documents that were either seized or turned over by
10 Mr. Davidson relating to privilege and the like, including text
11 message exchanges. We have asked Mr. Davidson for all of the
12 text messages exchanged, for instance, with Mr. Cohen. He
13 claims he no longer has them, that the government has them. We
14 know that such text messages exist, which is one of the reasons
15 why we want to intervene, so that we can protect my client's
16 rights and get those documents.

17 I wanted to raise that issue for the Court. I'm not
18 looking for anything to be decided today, but I did want to
19 highlight the issue. Thank you.

20 THE COURT: Anyone else? If there is nothing further,
21 we are adjourned. We are keeping the May date. Thank you.

22 (Adjourned)

23

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25